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The Judge's Corner

"You Have the Right to Avoid Litigation..."

By [Hon. Ron Spears](#)

Lincoln told a young lawyer, "Persuade your neighbors to compromise whenever you can." Maybe judges should admonish clients of their right to resolve their dispute before trial.



The discussion was lively at the dinner table of lawyers and judges following the Inn of Court program, which featured a panel discussion entitled "The Lawyer as Professional Peacemaker." All the talk of collaborative law, alternate dispute resolution, restorative justice, and therapeutic jurisprudence had been too much for some of the Inn members.

A litigator, not an auctioneer?

"I'm a trial lawyer," said one old litigator, "and settlement is just a distraction from the aggressive mindset I need to be effective. Law school taught me how to go to trial, not be an auctioneer. The client thinks I'm weak if I continually plead for settlement.

"Nobody wants to try cases anymore. The plaintiff and defense attorneys delay the expensive depositions and drag the case out, believing it will settle before trial. Then they're not ready for trial and clients have to settle. In the future we won't have experienced trial lawyers; we'll only have settlement processors."

"It costs too much to litigate cases through trial," interjected a younger trial attorney, "so the close cases get settled. Our primary objective is to nail down the facts and law and find a way out. Otherwise, the client thinks we're milking the case for fees even though we keep telling them their options. Look at all the articles about the 'disappearing jury trial.' Cases only go to trial when liability is seriously in dispute and there's no offer or where parties can't compromise on damages."

"There is too much unpredictability in the verdicts of juries and even judges," said an attorney who also serves as a mediator, "and the client is better off retaining some control and accepting something in the acceptable range than leaving it to chance. Besides, sometimes the client is really seeking something other than money that can be better realized through negotiation."

A psychologist that had been on the panel joined in the discussion. "Please consider the emotional and even physical impact it has on clients when these conflicts take years to resolve," she said. "It's also important in many cases that the parties be able to deal amicably with each other in the future. For those reasons and many others, a quicker, more collaborative dispute resolution system is worth considering. Besides, if lawyers saw themselves as peacemakers rather than warriors, maybe there'd be fewer lawyers in therapy."

The debate raged around the table, with good points on all sides. Proposals ranged from hiring staff mediators for the circuit and appellate courts to requiring formal MCLE training for all attorneys in negotiation and settlement techniques to making ADR an optional "door" of the court system. A few maintained that all of this was dooming the traditional civil court system and that the options should be declared illegal.

It was at this point that Judge Justice joined the dinner table. He was late from issuing a search warrant after the state's attorney had tracked him down at the Inn program. The debaters drew him into the discussion by giving an abbreviated version of their respective positions.

Just as the final presenter concluded and all eyes turned to the judge, the waiter brought the entrée. Judge Justice said, "I think Lincoln had something to say that is relevant to the issue. I'll send my thoughts to you later. Now, I hope we can all agree to eat this wonderful meal in peace and discuss sports and weather."

"[T]he nominal winner is often the real loser"

A few days later, Judge Justice sent the following note.

Dear Colleagues:

You all know I believe in our civil justice system, including the right to jury trials. It is a fair and effective system for resolving many types of disputes.

However, we must realize that as lawyers and judges we are also called to be peacemakers in our communities. Lawyers must listen carefully to their clients and help them define their objectives within the law. They must then work with opposing counsel to find common ground in an environment of mutual respect. Judges must encourage conflict resolution throughout the process, with trial as a last resort.

I would like to quote two famous lawyers on the important role our profession should play in peaceably resolving disputes. Interestingly, while both advocated peace, they had to endure long periods of intense conflict before achieving their objectives.

Abraham Lincoln, in *Notes for a Law Lecture*, observed as follows:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man [remember, women were ineligible to join the bar in Lincoln's day]. There will still be business enough.

Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.

Lincoln followed his own advice. See Mark Steiner, *The Lawyer As Peace-maker: Law and Community in Abraham Lincoln's Slander Cases*, 16 *Journal of the Abraham Lincoln Association* No. 2 (Summer 1995).

M.K. Gandhi was a lawyer in Africa before becoming Mahatma in India. He observed thusly:

I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul.

As a trial court judge, I see on a regular basis what Lincoln and Gandhi were getting at. People come into conflict and need a resolution. Their initial attempts to avoid litigation fail, and they turn to the civil court system. At that point, lawyers serve as the "toll bridge across which anyone in search of justice must pass."

For the client, the case typically is the only one they have pending and becomes a significant part of their life. Until it is resolved they endure nagging tension, not to mention attorney fees and costs. For the lawyer, the case is one of tens or even hundreds and will receive its due attention. It has been said that "due attention" resembles a barbell, with the greatest weight at the beginning and end of the case.

In my experience, once both sides have gathered enough information to ascertain the law and facts, it would be helpful if the judge could give both sides what I'll the "Lincoln Warnings." This can be done at an early pretrial conference at which the parties are ordered to appear.

I have in mind something like *Miranda* warnings, with a hint of deadlocked jury instruction, geared to civil litigants. The exact warnings would vary from case to case but would usually be something like this:

"You have the right to resolve your civil case by mutual agreement through settlement or alternate dispute resolution. If you give up that right, your factual disputes will be under the judgment of an impartial judge or jury, based upon their perception of legally admissible evidence introduced and evaluated over the days of trial, and you cannot accurately predict what their decision will be.

"You have the right, if you can afford the fees and costs, to an attorney and to have an attorney present during all phases of the proceedings. The attorney cannot guarantee any results. It is not a sign of weakness, but rather a sign of professionalism, for your attorney to fully explore with you options to peaceably resolve your case without trial. However, the final decision is yours alone as you will ultimately be the one to live with the consequences, good or bad, of the verdict.

"If you cannot afford an attorney, you will have to represent yourself and be held to the same standards as an attorney. There are no speedy trial limits on a civil case and thus no guarantee how long it will be until the trial is held. Post-trial appeals will produce additional delays of a year or longer and additional attorney's fees and costs.

"There is often no guarantee that a judgment will ever be paid. The nominal winner could end up being the real loser - in fees, expenses, and waste of time. You will not be compensated for your mental or physical distress or loss of work to pursue the litigation.

"Please consult with your attorney and deliberate with a view toward reaching an agreement. Be aware that a considerable amount of fees and costs will be expended from this point until the completion of the trial. Do not hesitate to reexamine your own views and agree upon a settlement to end the case now if convinced it is appropriate under the law and facts. You may find that a peaceable resolution reached by agreement, even if it doesn't produce everything you desire, is better and more honorable than anything you can achieve through litigation."

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